

Duran v. U.S. Bank:

Developing a Trial Management Plan that Highlights Individual Defenses in Class Actions and the Problems Associated with Statistical Sampling in Class Certification and Trial



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On May 29, 2014, the California Supreme Court issued its long-awaited decision in *Duran v. U.S. Bank*. In a unanimous decision, the Supreme Court affirmed the appellate court's reversal of a near \$15 million class action judgment, and set forth substantive standards for trial courts to follow to determine whether class certification is appropriate in the face of significant individual questions, especially those involved in an employee misclassification claim. The trial court's refusal to admit defense evidence relating to class members outside the sample group had inappropriately impaired the defendant's ability to present a defense, as a class action trial management plan "must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." Further, while statistical sampling can be an appropriate way to assess liability and damages in some wage and hour class actions, the trial court's acceptance of the plaintiff's approach to sampling was "profoundly flawed" because, among other things, the sample size (1) was too small; (2) was not random; and (3) involved an "intolerably large" margin of error of 43.3%.

A trial plan that relies on statistical sampling must be developed with expert input and

must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced. *Duran* is the first case to consider the now prevalent use of statistical evidence by class action parties at the class certification stage and at trial, and represents a significant victory for California employers in defending wage and hour class actions.

I. Background.

A. The trial court certified a class based on plaintiffs allegations of unpaid overtime, attributed to misclassification as exempt employees under the outside salesperson exception.

Defendant U.S. Bank National Association (USB) USB was a nationwide financial services provider who operated over 130 branches in California. Plaintiffs were USB employees who worked as business banking officers (BBOs). BBOs sold bank products, including loans and lines of credit, to small business customers, and their primary job was to cultivate new business. USB had classified the BBO position as exempt from overtime compensation, primarily based on the outside salesperson exemption in Labor Code §1171.2. This exemption applies to

employees who spend more than 50 percent of the workday engaged in sales activities outside the office. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 (Ramirez).) Plaintiffs alleged the BBOs at US Bank were misclassified.

At support of class certification, Plaintiffs provided declarations for 34 current and former BBOs. In turn, USB provided declarations from 83 putative class members, 75 of which stated they typically spent 50% or more of their workday engaged in outside sales. Despite opposition by USB, the trial court certified the class, relying on *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (Sav-On). The trial court found common questions of law and fact predominated over individual issues based on evidence that: (1) the BBO position was standardized; (2) USB classified all BBOs as exempt without examining each employee's duties or work habits; and (3) USB failed to train or monitor BBOs to ensure that exemption requirements were satisfied. The class was ultimately defined as all California-based BBOs who worked overtime for USB at any time during the period from December 26, 1997 until

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September 26, 2005. The total class was 260 employees. USB's writ of mandate related to the certification was denied.

B. The trial court crafted a trial management plan based on a small sample of random class members' experiences, which would then be extrapolated to the whole class, and entered judgment for close to \$15 million based on the fiction that every class member had been misclassified.

Approximately one year post-certification, the parties presented competing trial management plans. Plaintiffs' initial plan was to divide the class into 20-30 groups and have special masters conduct individualized evidentiary hearings on liability and damages. As an alternative, Plaintiffs proposed a random sampling, as set forth by their expert Richard Drogin, in which the entire class would be surveyed (notably no such survey was ever done). USB objected, submitting a declaration from its expert, Philip Gorman, who opined that reliance on such a small sample size presented a high risk of error, and that the survey would still likely be biased due to the probability that any properly classified employees would not participate in the survey. USB proposed the parties each select an equal number of class members for the trial sample.

The trial court rejected USB's proposal, and enacted an alternative plan of its own devising, that the trial court (literally the clerk of the trial court) would select a random sample of 20 class members, known as the representative witness group, to testify at trial. The trial would be broken down into two phases: (1) liability; and (2) restitution. Any findings on liability would then be extrapolated to the remainder of the class. USB again objected that an attempt to extrapolate liability from representative testimony would violate due process, noting that there was "no precedent for using random sampling to establish liability in a class action involving the outside sales exemption." The trial court proceeded with its own trial plan and the RWG.

Shortly after, USB moved to decertify the class, citing new case law and deposition

testimony of several class members, arguing individual issues predominated. USB's statistician, Andrew Hildreth, identified several problems with the representative witness group, including the small size of the sample, the selection bias, and the multiple "non-response" errors. Importantly, Hildreth found that there was no basis for the court to conclude the *entire* class had been misclassified. Despite this, the trial court proceeded on, further denying USB's motion in limine that sought to include testimony by employees outside of the representative witness group, and USB was officially barred from presenting evidence of work habits/hours of any such employees. Phase 1 of the trial lasted 40 days.

In Phase Two of the trial, USB again sought to include deposition testimony and declarations of employees outside the representative witness group. The court denied the request, as inconsistent with the Phase 1 of the trial. Plaintiffs moved in limine to prevent USB from introducing any evidence pertaining to liability because that question had been resolved in the court's statement of decision for phase one. Plaintiffs' statistics expert, Richard Drogin opined that the Phase One findings of liability and average weekly hours of unpaid overtime could be reliably projected to the whole class because they were based on a random sample. Taking the court's indicated findings for Phase One, with adjustments for vacation time and other breaks in service, Drogin calculated a weighted average of overtime for the representative witness group at 11.87 hours per week, 12 with a margin of error of plus or minus 5.14 hours at a 95 percent confidence interval. *The relative margin of error for the overtime estimate was plus or minus 43.3 percent.*

The trial court granted the motion, noting that the purpose of Phase One had been to resolve USB's class-wide liability for misclassification. The trial court effectively barred any challenge to its Phase One decision that all class members were misclassified as exempt and all were entitled to overtime compensation, in the face of due process argument proffered by USB. The court ultimately entered a judgment against USB for nearly \$15 million. This

was only the second misclassification case in California certified as a class action and tried to verdict.

II. The Supreme Court's Decision.

USB appealed the judgment and the appellate court reversed. The appellate court distinguished an earlier case approving the use of representative testimony in an overtime class action, *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, in that *Bell* utilized sampling at the trial of damages only, not liability.

In affirming the appellate court's decision, the Supreme Court found that the appeal highlighted difficult questions about how individual issues can be successfully managed in a complex class action, and that the trial court had an obligation to consider the manageability of individual issues in certifying a class action. The *Duran* court found the trial court ignored individual issues, effectively "hamstringing USB's ability to defend itself." There were fatal flaws in the trial plan's implementation of statistical sampling as proof of USB's liability to the class.

Trial courts have the obligation to decertify a class action if individual issues prove unmanageable, (*Sav-On* 34 Cal.App. at 335) and the trial court should have considered these at the certification stage, including any statistical proof a party anticipates will weigh in favor of granting class certification. Notably, the Supreme Court rejected plaintiffs' characterization of class actions as creating a requirement that the trial court fashion a way to resolve the parties' dispute through common evidence: "plaintiffs assert, '[i]t would be inconsistent with the requirement of common evidence' for the employer to be permitted to litigate its exemption defense against individual class members," but, the Court held, "plaintiffs' argument rests on a false assumption. Class actions do not create a 'requirement of common evidence.' Instead, class litigation may be appropriate if the circumstances of a particular case demonstrate that there *is* common evidence." (Emphasis in original.)

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III. Lessons Learned from the Duran decision Relevant to Opposing Class Certification.

A. Prepare a strong trial plan early on in the litigation.

The Supreme Court's emphasis on the need for a workable trial plan prior to class certification is particularly significant, given the trend of class action claims in California. The court noted that according to the Administrative Office of the Courts, 89% of class actions that are certified settle prior to trial, compared with 15% of cases where class certification was denied, creating a clear disadvantage to defendants after the certification stage.

Plaintiffs have urged trial courts to certify based on a (mis)reading of the Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). Many trial courts, accepting plaintiffs' arguments, have concluded that almost any claim can be certified if any essential element of plaintiff's theory of relief appears to be susceptible of common proof; regardless of whether the aspect of the case that may be subject to common proof will really *predominate* in resolving the case as a whole, in light of the material issues to be tried that are, in fact, subject to individualized differences. *Duran*, however, indicates that class treatment is inappropriate where individualized differences make proceeding as a class all the way to judgment unfair or unmanageable—even if one central liability question might manageably be proved on a class-wide basis.

Duran therefore will aid defendants who craft a well prepared trial plan at the certification stage to show a preliminary assessment of variability, and to demonstrate that individual issues swamp common issues to render a class action unmanageable.

B. Present individualized defenses to class claims.

Defendants should be prepared to vehemently counter any purported representative showing by the plaintiff, using concrete examples backed by

affirmative evidence. For example, in disputing allegations of misclassification, defendants should present direct evidence demonstrating individualized differences among putative class members in what job duties they perform and how much time they spend on those duties. This evidence can include putative class member declarations, employer self-audits, surveys, studies, and even video evidence.

Moreover, employers who rely on the outside sales exception can take a preventative approach *before* the onset of litigation by performing self-audits or interviews, which ensures that employees are meeting the 50%-plus test on a consistent basis; if they are not, the employer will be able to help the employees amend his or her workload or to reclassify the employee as non-exempt if necessary. These self-audits can be used both to oppose class certification and to support the employer's defense at trial.

Duran plainly supports the standard that if the trial court cannot conduct a fair trial on the class claims, while allowing employers the ability to assert affirmative defenses (and evidence) as to the class, certification should be denied. This standard applies not only to misclassification allegations, but all wage and hour claims.

C. Attack inadequate and unqualified statistical methods.

Defendants will benefit from early (and often) opposition to biased or incomplete sampling, both at the certification stage and pre-trial, or statistical evidence that lacks expert approval. The *Duran* court made a point to reference USB's repeated objections to Plaintiffs' proposed samplings and expert's opinions. Utilizing expert analysis, defendants can impeach plaintiff's statistical model of proof and focus the trial court on affirmative defenses, especially if it includes individualized evidence. Statistical methods may not be compatible with the nature of plaintiff's claims, and defendants should not hesitate to question plaintiff's sample size and expert's analysis. Samples must be supported by a party's liability expert, must be statistically appropriate and capable of producing valid results with a reasonable margin of error, and must be random.

Duran illustrates the misuse of statistical evidence in class litigation, where the margin of error was unreasonably high, 43%, and incompatible given the individualized claims.

Plaintiffs will no doubt claim the Supreme Court did not wholly preclude the use of sampling and surveys in class litigation; but *Duran* imposes restrictions on this practice. If statistical evidence is to be used as part of a trial plan for managing a complex class action, methods to be employed by class counsel must be presented, evaluated, and scrutinized early in the life of the case, and in any event no later than the hearing on class certification. Trial courts are not permitted to assume that the use of statistical methods will serve as a solution to unmanageability issues that would arise if each class member's differing circumstances were explored at trial.

As wage and hour class actions continue to arise in California, *Duran* presents a clear message from the judiciary that class litigants must acknowledge, and adhere to, due process in class certification proceedings and trial. The guidelines provided in *Duran* provide substantial support for defendants who can present individualized evidence when faced with class claims, and will reward defendants who can present this evidence early on in litigation. 📌

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